

## REQUEST FOR COUNCIL ACTION

MEETING

DATE: 6/16/03

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<b>AGENDA SECTION:</b> Reports & Recommendations	<b>ORIGINATING DEPT:</b> City Administrator	<b>ITEM NO.</b> F-1
<b>ITEM DESCRIPTION:</b> Findings of Fact for Conditional use Permit #03-11 and Variance appeal #03-01 (Zumbro River Constructors and Lake George)		<b>PREPARED BY:</b> T. Spaeth

At the June 2, 2003 City Council meeting, the Council held a public hearing to consider the request for approval of a Conditional Use Permit #03-11 and Variance Appeal #03-01 concerning property located south of Lake George, north of the Zumbro River and west of Highway 52.

Upon review of the record, the City Attorney has prepared findings of fact and conclusions of law and order relating to said request. Attached for the Council's review are the findings of fact prepared by the City Attorney.

### ATTACHMENTS:

- Copy of City Attorney prepared Findings of fact and Conclusions of Law dated June 9, 2003.

### COUNCIL ACTION REQUESTED:

The Council may adopt, modify or revise the findings of fact, conclusions of law and order as needed.

**COUNCIL ACTION:** Motion by: \_\_\_\_\_ Second by: \_\_\_\_\_ to: \_\_\_\_\_

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OFFICE OF THE CITY ATTORNEY  
MEMORANDUM

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DATE: June 9, 2003

TO: Stevan E. Kvenvold – City Administrator

FROM: Terry L. Adkins – Rochester City Attorney *TLA*

SUBJECT: Findings of Fact for Conditional Use Permit #03-11 and Variance Appeal #03-01  
(Zumbro River Constructors and Lake George)

On June 2, 2003, the Council held a public hearing to consider the request for the approval of Conditional Use Permit #03-11 and Variance Appeal #03-01 (Zumbro River Constructors and Lake George) concerning property located south of Lake George, north of the Zumbro River and west of Highway 52. Following the hearing, the Council directed me to prepare draft Findings of Fact, Conclusions of Law and Order and to bring this document back to the Council for its review and consideration. As further instructed by the Council, I prepared the Findings document so as to grant the requests for approval.

I enclose that draft document for presentation to the Council. The Council may adopt, reject or modify the document as it pleases.

Enclosure

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BEFORE THE COMMON COUNCIL  
CITY OF ROCHESTER, MINNESOTA

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In Re: Conditional Use Permit  
#03-11 and Variance #03-07  
by Zumbro River Constructors

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Findings of Fact,  
Conclusions of Law,  
and Order

On June 2, 2003, the City of Rochester Common Council conducted a public hearing, upon notice to the public, to consider Conditional Use Permit #03-11 and the appeal of Variance #03-07 requested by Zumbro River Constructors ("Applicant"). The Applicant seeks approval to permit excavation of property located south of Lake George, north of the Zumbro River and west of T.H. 52 ("Site"). Excavation is proposed to provide construction materials for the T.H. 52 reconstruction improvement project ("ROC52 Project") and would include haul route access directly to T.H. 52. The Site includes approximately ten acres of land zoned R-1 (Mixed Single Family Residential), which is also in the Flood District and Shoreland District. Multiple conditional use permits and variances will be considered as part of this application.

At the hearing, Jeff Broberg of McGhie and Betts appeared and testified on behalf of the Applicant and testified in favor of the requests. Numerous neighbors appeared and testified in opposition to the requests. Attorney Robert Suk appeared on behalf of five of the six relevant homeowner associations and testified in opposition to the requests. In all, the Council conducted an hour and a half public hearing on this issue.

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The Council considered the information contained in the agenda packet. A copy of the relevant agenda packet is attached, incorporated herein and identified as Exhibit A. The Council also considered letters submitted by adjacent property owners, a copy of which is attached, incorporated herein and identified as Exhibit B. The Council also considered testimony provided at the public hearing. Based upon all of the testimony and written evidence presented at the public hearing, the Common Council of the City of Rochester does hereby make the following findings of fact, conclusions of law, and order.

#### FINDINGS OF FACT

1. This matter is properly before the Common Council pursuant to R.C.O. §§60.533(4), 60.733(1), 61.301 and Minn. Stat. §462.3595, subd. 2.

2. The Applicant seeks approval to permit excavation of property located at the Site. Excavation is proposed to provide construction materials for the ROC52 Project and would include haul route access directly to Highway 52. The Site includes approximately ten acres of land zoned R-1 (Mixed Single Family Residential), which is also in the Flood District and Shoreland District.

3. In summary, the applicant is proposing to extract sand & gravel materials from the Site. Excavation would begin this year and be completed in 2006. This time frame coincides with the schedule for the ROC52 Project. In order to coordinate the excavation with the ROC52 Project time frame, the Applicant is requesting approval to operate 24 hours a day, 7 days a week, 12 months a year as the weather and seasons permit. Temporary light fixtures would be used for night operations, similar to lighting for night construction within the ROC52

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construction zone (which is directly adjacent to the east side of this property). As part of the ROC52 Project, excess earthen materials will be removed from the construction zone which will need to be disposed of. The Applicant is proposing to utilize some of this excess earth material to reclaim the excavation Site (primarily the slope of the lakebed), which will result in some materials being hauled in to the Site during the phasing of the project. Applicant proposes temporary stockpiling in the Flood District so as to provide enough materials for one day of hauling from the Site.

4. The Applicant applied for the following conditional uses:
  - A. Excavation of sand/gravel in the Floodway District pursuant to R.C.O. §62.833; and
  - B. Sand and gravel excavation pursuant to R.C.O. §62.1000.
5. The Applicant applied for the following variances:
  - A. R.C.O. §62.1006(1)(b)(2) does not permit shoreland alterations and intensive vegetation clearing within 50 feet of the ordinary high water mark. Applicant seeks to clear and excavate within 35 feet of the ordinary high water mark.
  - B. R.C.O. §62.1106(2)(e)(2) states that water bodies should be a minimum five acres with an average depth of 24-30 feet. Applicant seeks a water body with a maximum of 4.6 acres and without the average depth.
  - C. R.C.O. §62.1106(4)(b) states that a 50-foot bufferyard with plantings along the perimeter of the site to be planted in the first season. Applicant seeks to excavate within 35 feet of the ordinary high water mark. Existing vegetation will remain in that area to provide some buffer during operation.
  - D. R.C.O. §62.1108(1)(b) states that the hours of operation should be from 7am to 10pm. Applicant seeks to operate 24 hours a day and to use lighting at night.

- E. R.C.O. §62.1108(1)(j) states that a six-foot security fence must be installed along entire perimeter. Applicant seeks to provide a security fence only along the north and west property boundaries. The Zumbro River will provide a barrier to the south and T.H. 52 will provide a barrier to the east.
- F. R.C.O. §62.1108(1)(k) states that there must be a 500-foot setback to adjacent property zoned R-1 and a 750-foot setback to stockpiles and loading areas. Applicant seeks to avoid these setback requirements.
- G. R.C.O. §62.1108(1)(q) states that there should be no excavation within 100 feet of protected waterbody, unless permitted by the DNR. Applicant seeks to excavate within 35 feet of the ordinary high water mark.

6. R.C.O. §61.146 provides the criteria by which the Applicant's request for conditional use permits must be determined. That section states as follows:

61.146 **Standard for Conditional Uses:** The zoning administrator, Commission or council shall approve a development permit authorizing a conditional use unless one or more of the following findings with respect to the proposed development is made:

- 1) Provisions for vehicular loading, unloading, parking and for vehicular and pedestrian circulation on the site and onto adjacent public streets and ways will create hazards to safety, or will impose a significant burden upon public facilities.
- 2) The intensity, location, operation, or height of proposed buildings and structures will be detrimental to other private development in the neighborhood or will impose undue burdens on the sewers, sanitary and storm drains, water or similar public facilities.
- 3) The provision for on-site bufferyards and landscaping does not provide adequate protection to neighboring properties from detrimental features of the development.
- 4) The site plan fails to provide for the soil erosion and drainage problems that may be created by the development.

- 5) The provisions for exterior lighting create undue hazards to motorists traveling on adjacent public streets or are inadequate for the safety of occupants or users of the site or such provisions damage the value and diminish the usability of adjacent properties.
- 6) The proposed development will create undue fire safety hazards by not providing adequate access to the site, or to the buildings on the site, for emergency vehicles.
- 7) In cases where a Phase I plan has been approved, there is a substantial change in the Phase II site plan from the approved Phase I site plan, such that the revised plans will not meet the standards provided by this paragraph.
- 8) The proposed conditional use does not comply with all the standards applying to permitted uses within the underlying zoning district, or with standards specifically applicable to the type of conditional use under consideration, or with specific ordinance standards dealing with matters such as signs which are part of the proposed development, and a variance to allow such deviation has not been secured by the applicant.

7. R.C.O. §62.824 states that, when a request for a conditional use permit involves a flood district, the following factors should also be considered:

62.824 **Conditional Use Permits – Standards for Approval:** When deciding on Conditional Use Permits in any of the flood districts, the following factors, in addition to the standards of Paragraph 61.146 shall also be considered:

- 1) The danger to life and property due to increased flood heights or velocities caused by encroachments.
- 2) The danger that materials may be swept onto other lands or downstream to the injury of others.
- 3) The proposed water supply and sanitation systems and the ability of these systems to prevent disease, contamination, and unsanitary condition.

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- 4) The susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner.
  - 5) The importance of the services provided by the proposed facility to the community.
  - 6) The need for a waterfront location for the facility.
  - 7) The availability of alternative locations not subject to flooding for the proposed use.
  - 8) The compatibility of the proposed use with existing development and development anticipated in the foreseeable future.
  - 9) The relationship of the proposed use to the comprehensive plan and flood plain management program for the area.
  - 10) The safety of access to the property in times of flood for ordinary and emergency vehicles.
  - 11) The expected heights, velocity, duration, rate of rise, and sediment transport of the flood waters expected at the site.
  - 12) Such other factors which are relevant to the purposes of Paragraph 62.800.

8. R.C.O. §62.1105 states that, when a request for a conditional use permit involves an excavation activity, the following findings must be made:

62.1105 **FINDINGS NECESSARY FOR ISSUANCE OF CONDITIONAL USE PERMITS:**

The City shall approve a conditional use permit authorizing an excavation activity only if all of the following findings with respect to the proposed activity are made, in addition to those listed in Section 61.146:

- 1) The activity will not result in a danger to life or property due to (1) steep or unstable slopes, (2) unsafe access to the



property, (3) excessive traffic, or (4) proximity to existing or planned residential areas, parks and roadways;

- 2) Visual, noise, dust, and/or excessive on- or off-site environmental impacts on public parks, roadways and residential areas can be adequately mitigated by the Applicant and a fully detailed plan is submitted by the Applicant to demonstrate the mitigation methods to be used, the cost of such mitigation, the source of funds for such mitigation, and adequate legal assurance that all of such mitigation activities are carried out;
- 3) The use of trucks and heavy equipment will not adversely impact the safety and maintenance of public roads providing access to the site, or such impacts will be mitigated;
- 4) The proposed use will not adversely affect air quality or ground water or surface water quality;
- 5) The proposed use will not adversely affect the scenic quality of Rochester or the natural landscapes, environment, wildlife and wildlife habitat; or if such effects are anticipated to occur, the reclamation plan provides for adequate restoration of the site following completion of the excavation activity;
- 6) The activity will be compatible with existing development and development anticipated in the future, including other uses as shown in the Comprehensive Plan, including but not limited to: patterns of land use, recreational uses, existing or planned development, public facilities, open space resources and other natural resources;
- 7) The activity will not unduly affect the use and enjoyment of adjacent properties;
- 8) The site plan provides for adequate buffers and screening year-round from unsightly features of the excavation operation;
- 9) The reclamation plan provides for adequate and appropriate restoration and stabilization of cut and fill areas;
- 10) The excavation activity will not result in negative impacts on

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drainage patterns or stormwater management facilities;

- 11) The proposed activity will minimize impacts on sinkholes, wetlands and other natural features affecting ground water or surface water quality;
- 12) The intensity and the anticipated duration of the proposed excavation activity is appropriate for the size and location of the activity;
- 13) Permanent and interim erosion and sediment control plans have been approved by the City;
- 14) Surety has been provided that guarantees the site will be fully restored, after completion of the excavation activity, to a safe condition, and one that permits reuse of the site in a manner compatible with the Comprehensive Plan, neighborhood plans, the Land Use Plan and applicable City policies.
- 15) The proposed activity complies with the requirements of the adopted building code.

9. R.C.O. §60.417 states that the City may grant a variance to the provisions of the

Zoning Ordinance under the following guidelines:

- A. there are extraordinary conditions or circumstances, such as irregularity, narrowness, or shallowness of the lot or exceptional topographical or physical conditions which are peculiar to the property and do not apply to other lands within the neighborhood or the same class of zoning district; and
- B. the variance is necessary to permit the reasonable use of the property involved; and
- C. the variance will not be materially detrimental to the public welfare or materially injurious to other property in the area, is in harmony with the general purpose and intent of the ordinance, and will not adversely affect implementation of the Comprehensive Plan; and
- D. the variance as granted is the minimum necessary to provide reasonable economic use of the property.

10. Minn. Stat. §462.3595, subd. 1 states that a local governing body may approve a conditional use upon a showing by the applicant "that the standards and criteria stated in the ordinance will be satisfied."

11. The Planning Department staff recommended the following findings of fact for the requested variances:

EXCEPTIONAL CIRCUMSTANCES: There are no residential dwellings as land uses that directly abut this property. To the north, is the existing Lake George. Homes on the north side of that lake are approximately 600' from the property included in this petition. To the west, the nearest homes are approximately 870' from the Zumbro River which is near the western boundary of proposed excavation included in this petition. To the south is the Zumbro River, City Park land and other undeveloped parcels. TH 52 abuts this property to the east. The applicant is proposing a relatively short time frame (approx 3 years) to complete the excavation and reclamation of this property, to coincide with the condensed ROC52 reconstruction project. Direct access to TH 52 will result in no hauling on local City or County roadways.

REASONABLE USE: Most of this property is in the Floodway. Use of the property is very limited due to the Floodway designation of the property. Though Variances may not be required to permit the reasonable use of the property involved, granting of the Variances would provide reasonable use of the site for extraction of the granular material resource.

ABSENCE OF DETRIMENT: The granting of this variance request does not appear to be materially detrimental to the public welfare or to other property in the area. TH 52 will undergo significant transformations during the same time frame proposed for excavating this site. The Highway will be a construction zone, that will generate noise, truck traffic and night lighting associated with such a major project. Since the property included in this petition is directly adjacent to the Highway, excavation activities may appear more ancillary to the overall ROC52 project and the impacts of this excavation activity may be noticed less than without the ROC52 project. Water quality issues, related to the size and depth of the proposed water body have been addressed by the applicant's consultant.

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MINIMUM VARIANCE: Variances requested, though they may not be the minimum necessary, would provide reasonable economic use of the property to extract the maximum amount of material possible while maintaining the ability to reclaim the site as required by the Rochester Zoning Ordinance and Land Development Manual.

12. The Planning Department staff did not recommend any findings of fact for the Applicant's requested conditional use permits. However, the Planning and Zoning Department staff recommended approval of the Applicant's request subject to the following conditions:

- A. Prior to excavation, the Applicant must provide the City with a financial security consistent with R.C.O. §62.1108(1)(i).
- B. Stockpiling of materials on this Site shall be limited to materials excavated from this property. Stockpiling shall be temporary to provide one day worth of material to be hauled from the Site. Stockpiles shall be removed from the Site prior to ceasing operations for more than five working days.
- C. Approval of this permit shall expire January 7, 2007, unless permit approval is extended as provided in R.C.O. §62.1110(7). All reclamation activities must be completed prior to the date of expiration, consistent with reclamation standards of the Rochester Zoning Ordinances and Land Development Manual.
- D. Prior to dewatering, the Applicant must file with the Planning Department a copy of an approved Water Appropriations Permit from the MNDNR for such activity.
- E. Prior to commencing operations on this property, the Applicant shall obtain grading plan approval from the City.

13. On May 14, 2003, the Planning and Zoning Commission met to consider this matter. At the Commission's hearing, many neighbors appeared and testified that they had a use agreement that provided for their use and enjoyment of Lake George. They indicated the granting of the conditional use permits and variances to the Applicant would violate those use

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agreements. Primarily for that reason, the neighbors asked the Commission to recommend the denial of these requests. The Commission recommended the denial of Conditional Use Permit #03-11 and denied Variance #03-07. The matter of the conditional use permits came before the Council as required by ordinance. Applicant also appealed the denial of the variances to the Council.

14. At the June 2<sup>nd</sup> public hearing, the City Attorney indicated that Council could not consider any private use agreements that might be impacted by the requested conditional use permits and variances. According to the City Attorney, the City is not a party to any of these agreements. Furthermore, the City is proceeding on the basis of its land use laws which are independent and separate from any private use agreements. The City Attorney indicated that the City's review of the Applicant's requests would be confined to the criteria provided by the City's land use ordinances. If the City approves the requested conditional use permits and variances, and if such activity would amount to a breach of any private use agreement, the property owners would have their own personal legal actions available to them to seek redress for any resulting breach of contract.

15. At the June 2<sup>nd</sup> public hearing, Mr. Broberg testified on behalf of the Applicant and stated the following:

- A. Buzz Quick owns the Site. The Applicant seeks to mine sand and gravel on this parcel pursuant to its contract with the State of Minnesota for the ROC52 Project.
- B. The Site is zoned R-1, has no public road access, it is in the flood way and it abuts the ROC52 Project.
- C. Sand and gravel extraction is allowed on this property as a conditional use if the extraction satisfies the applicable criteria.

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- D. The plan is to haul excavated sand and gravel directly to the work site of Highway 52 and avoid putting 25,000 dump trucks on city streets and county roads. The plan will not add additional traffic to the local streets. The heavy truck traffic will be restricted to a work zone rather than city streets.
  - E. This is a temporary project. All of the excavated material will be used solely for the ROC52 Project. There will be three years of excavation and one year of restoration. Following restoration, there will be a new lake adjoining the Zumbro River and the existing Lake George.
  - F. There will be no new structures. Applicant will maintain the tree buffer along the existing lake. There is an erosion control plan. Exterior lighting will be temporary in nature and will only occur during nighttime work (about 30 days a year). The access is to the work zone.
  - G. There is a plan to abate and mitigate excessive noise and dust.
  - H. The wooded corridor will be preserved and the landscape plan will involve additional trees, plants and trails around the lake.
  - I. This plan is compatible with existing development. Lake George is immediately adjacent to this site. This is the process by which Lake George was created. The nearest neighbors are 540 feet from the Site. There will be no other development as a result of this excavation/restoration plan.
  - J. There will be no adverse impact on drainage patterns or wetlands.
  - K. The plan has no impact on the 100-year flood elevations. There will be no increase in water levels as a result of the plan.
  - L. Emergency access will be maintained by way of haul roads.
  - M. There are extraordinary conditions for the Site. This is a reasonable use of R-1 property that has not road access, is within the flood way and is situated to be of major assistance in the ROC52 Project. This is an irregular sized parcel. Nighttime use is needed because of the accelerated schedule for completion of the ROC52 Project.
  - N. The variances are necessary for the best use of the Site as a source of sand and gravel immediately adjacent to the ROC52 Project. There is no other use of the land. Timing and location are such that this is the best use of this land.

- O. There is no detriment to the public. There will only be a temporary interference with the public's use of the property and there will be efforts to minimize any interference with the private use of the property. Applicant will preserve the trees along the shoreline and trees will be part of the restoration plan. Applicant will maintain the water level of Lake George. Applicant will maintain and improve the pedestrian trails around Lake George and relocate the picnic facilities away from the construction work. Temporary noise barriers and nighttime lighting will be used. There will be a phasing plan.
- P. The variances are limited in nature as they will only apply so long as the excavation is required for the ROC52 Project.

16. At the June 2<sup>nd</sup> public hearing, Mr. Broberg distributed a packet of information to the Council. A copy of that packet is attached, incorporated herein and identified as Exhibit C.

On page 2 of Exhibit C, the following proposed findings of fact for R.C.O. §61.146 appear:

- A. There will be no additional traffic on local streets. All vehicular activity will occur within the Highway 52 work zone. Pedestrian traffic on a private trail around Lake George will be maintained and will be separated from the work zone by a fence.
- B. No structures will be constructed on the site and there will be no impact on public utilities.
- C. The view of the site from properties along Lake George will be unchanged because of a buffer of existing trees and vegetation will be maintained around the site.
- D. An erosion control plan using Best Management Practices has been submitted as part of the application.
- E. Night lighting will be provided when night work occurs on the site (approximately 30 days per year). Temporary portable lighting will be below grade and therefore, will not be visible from the highway or homes on the other side of Lake George.
- F. The access road within the Highway 52 work zone will provide adequate access for emergency vehicles.
- G. Any changes in phasing will be submitted to city staff for review.

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- H. The site is zoned R-1, has no public road access, lies within the flood district, and has an unusual configuration. This is a reasonable and efficient use of the site, which cannot be developed under current circumstances. The proposed use is permitted in R-1 zones by CUP. Application has been made for all appropriate variances.

17. On page 4 of Exhibit C, the following proposed findings of fact for R.C.O. §62.1105

appear:

- A. Mining operation and disposition of fill soils will be done in compliance with best engineering practices. There will be no increase in traffic on local streets. This site will be fenced and there will be no public access to the site.
- B. A complete restoration plan has been provided with the application, which includes the creation of a new lake and re-vegetation of the disturbed area with trees, native plants and wetland grasses and wildflowers. A new trail will be built around the new lake. Noise will be controlled with temporary portable sound barriers and dust will be controlled with water and chloride.
- C. Use of this site for sand and gravel extraction will significantly decrease truck travel on Highway 52 and local streets near other mining sites. Use of this site will not add traffic to local streets because access is provided directly to Highway 52 through the Highway 52 work zone.
- D. The existing water levels in Lake George will be maintained at all times. The proposed action will not change the flow or flooding of the Zumbro River. Water quality in Lake George will be improved by the addition of a second lake. The project will have no adverse impact on air quality.
- E. A wooded corridor will be preserved around the entire site. The view of the site from the Lake George neighborhoods will not be changed. A reclamation plan provides for full restoration of the site including creation of a new lake and re-vegetation of the disturbed area with trees, native plants, wetland grasses and wildflowers.
- F. The site is zoned R-1, has no public road access, is within the flood district and cannot be developed. The proposed use is reasonable, efficient and best use of the property. Recreational use of the property will be maintained during the temporary mining activity. Residents will continue to have access to Lake George and will continue to have use of the trail and



picnic area presently located on or near the site.

- G. Existing recreational use of the property will be maintained during the temporary mining activity. Residents will continue to have access to Lake George and will continue to have use of the trail and picnic area presently located on or near the site. The water levels in Lake George will be maintained at all times. The reclamation of the site will create additional amenities for adjacent properties.
- H. A buffer of existing trees and vegetation will be maintained around the site.
- I. A complete reclamation plan has been included with the application that provides for restoration and stabilization of cut and fill areas.
- J. The mining activity will comply with requirements related to drainage and storm water management.
- K. There are no impacts on sinkholes, wetlands or other natural features affecting ground water or surface water quality. A no loss certificate has been applied for.
- L. Mining activity will be completed in three years, with restoration in the fourth year. This is a much shorter time frame than most mining operations.
- M. An erosion control plan is provided with the application.
- N. The City Engineer or City Attorney is required to provide the applicant with the necessary amount of surety.
- O. Not applicable.

18. On page 4 of Exhibit C, the following proposed findings of fact for R.C.O. §62.824

appear:

- A. There will be no increased flood heights or velocities caused during the excavation or after the restoration according to the Polaris Group HEC-RAS hydrologic study.
- B. The land clearing and grubbing will chip the wood products for use as mulch on the project. Stockpiling of materials on the site will be temporary and there is no danger of equipment or materials being swept onto other lands or downstream.

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- C. There are no permanent water supply and/or sanitation facilities proposed for the site. During the four year construction and restoration water and portable toilets for workers will be placed out of the floodway on the west end of the site within the MnDOT temporary easement.
  - D. There is no proposed facility or structure. All excavation equipment and support equipment will be mobile and can be removed from the work area within minutes.
  - E. The sand and gravel excavation, in a location abutting the US 52 project provides safety and efficiency to this massive public works project, keeping 17,000 – 25,000 truckloads of sand and gravel in the controlled work zone rather than on public streets.
  - F. The shoreland location for the project is predicated on the reasonable use of the property, the current zoning, the lack of public road access and the demonstrated geologic deposits of sand and gravel occurring along the Zumbro River.
  - G. Alternative sources of sand and gravel on areas not subject to flooding are not known to be available along this reach of the US 52. All other sand and gravel deposits south of 19<sup>th</sup> Street North are in flood prone areas.
  - H. The project area is zoned R-1 with no public road access and lies in the flood district. There is no other reasonable use of the land and no future development is foreseeable. The project will not have direct impact on residential development located 500 feet north, across Lake George and the private recreational use of Lake George, the trail and picnic area will be maintained.
  - I. The project is compatible with the City's flood plain management program.
  - J. Emergency access will be provided through the US 52 work zone off the MnDOT right-of-way.
  - K. The hydraulic modeling indicates that the mining operation will not increase the 100-year flood elevation more than 0.1 feet adjacent to the mining operation and will have no impact upstream of the mining area.
  - L. No other significant or relevant factors.

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19. On page 9 of Exhibit C, the Applicant states that the seven requested variances fall into two categories:

- A. Size, shape and configuration of the project as related to land alterations, setbacks, buffer yards and fence locations and land the size of the lake. The variances are necessary due to the irregular size of the parcel, the proximity to the Zumbro River and the unique circumstances of resources next to the US 52 project.
- B. Operational details. Variances are needed to conduct nighttime work as part of the US 52 project.

20. On page 9 of Exhibit B, the following proposed findings of fact for R.C.O. §60.417 appear:

- A. Extraordinary conditions:
  - (1) This R-1 zoned parcel has not public road access, lies in the flood district, has substantial sand and gravel reserves and abuts the US 52 reconstruction project.
  - (2) The size and shape of the parcel, coupled with the project need to maximize sand and gravel production does not fit the one-size-fits-all requirements of the Ordinance for setbacks, buffers, lake size and depth. Variances request reduced setbacks and buffers that will be restored to meet or exceed the requirements.
  - (3) The accelerated US 52 project schedule is predicated on 24-hour/day work.
  - (4) The fencing is only an effective barrier along the north side. The River is an adequate barrier to the south.
- B. The Variances are necessary:
  - (1) The only reasonable use of the property is excavation of sand and gravel under a CUP.
  - (2) Sand and gravel resources, available 24 hours/day are necessary for US 52.

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C. Not detrimental to the public:

- (1) Keeping the excavation and refilling activity within the work zone is not detrimental to the public.
- (2) The project will not impair or be detrimental to the public use of the property. Private use of Lake George and surrounding land will not be impaired.
- (3) No added flood risk or threats to water quality.

D. The variances are the minimum necessary:

- (1) The project duration is limited to the US 52 reconstruction.
- (2) The project will need materials at night during a portion of the construction season.
- (3) The project size and dimensions requested are the minimum necessary to meet the project demand for sand and gravel in this project segment.

21. In response to a question from Council member Marcoux, Mr. Broberg indicated the Applicant would accept the following additional conditions of approval:

A. The Applicant will maintain the associations' recreational use of Lake George including:

- (1) Maintain the trees on the shoreline of Lake George to preserve the existing view.
- (2) Maintain the water level in Lake George to be consistent with the historic lake levels that are influenced by the Zumbro River, unless agreed upon by the members of the Lake Board indicating they want the Lake to be drawn down to improve lake quality.
- (3) Maintain and improve the pedestrian trail that circulates around Lake George for use during the project.

- (4) Relocate the picnic facilities (tables, burn pit/barbeque and lawn) to an area less disturbed by the construction.
- (5) The haul road will be removed upon project completion and no new public access points will be created as part of the project.
- (6) Site restoration beyond that shown on the Landscaping Plan can include either planting of native prairie and wetland plants with wildflowers or can re-vegetate with grasses plus saplings of trees and shrubs.

B. Applicant will take measures to minimize noise, dust and light from the project.

- (1) Temporary noise barriers such as concrete curtain walls will be used around the excavation and loading area with Department of Natural Resources approval.
- (2) Lighting will be limited to nights when loading and hauling occurs (permanent night lights will not be used), and lighting will be the minimum necessary for safe operations and will be directed at the work areas.
- (3) Dust control will utilize water in the excavation and water or chloride on the haul road.
- (4) Circulation route design during nighttime will not involve backing up trucks.

C. Applicant can change the project phasing.

D. Applicant can control the material to be brought back in.

- (1) Fill materials will be limited to clean soils, sand, gravel and crushed rock.
- (2) Fill materials will be from US 52 project only.

22. At the June 2<sup>nd</sup> public hearing, several neighbors appeared and testified as follows:

- A. The Applicant will only be able to minimize light and noise coming from the excavation. It will not be able to eliminate it. Thus, there will be some inconvenience to the neighbors. The Bamber Valley area has already been subject to inconvenience as part of the ROC52 Project.
- B. A fully loaded diesel truck in low gear will produce about 160 or 165 db of noise. That will be less than 800 feet from some neighbors' windows. 38,000 fully loaded trucks will be required for this excavation project. At any time of the day, that number of trucks will cause loud noise. That noise will be exacerbated by nighttime operations, which will interfere with the residents' use and enjoyment of their homes. The adjacent residents have the right to the quiet enjoyment and reasonable use of their property.
- C. How does one decide what are "minimal" or the least amount of variances needed for this project? Yet, seven variances are not minimal.
- D. A buffer made up of trees will not stop noise. The trees currently do not buffer noise from the nearby soccer fields which are further away from the residences than this Site.
- E. A new lake will only hurt existing Lake George. The neighbors do not want a second lake nor a second set of pedestrian trails around the second lake.
- F. This project will only adversely impact the quality of life for those who live in this area.
- G. These permits and variances will not further the smart growth concept. It will not preserve the natural environment and minimize disturbances to the land, reduce erosion especially for trees, create walk able neighborhoods, foster distinctive, attractive communities, preserve open space, natural beauty and critical environmental areas.
- H. The Applicant has failed to satisfy the criteria for conditional use permits and variances.
- I. Noise from generators powering the lights will add to the noise inconvenience.

23. At the June 2<sup>nd</sup> public hearing, Attorney Robert Suk appeared on behalf of five of the six homeowners associations and testified as follows:

- A. The City was concerned about litigation resulting from the presence or absence of noise walls along the reconstructed Highway 52 adjacent to commercial and residential areas. For that reason, the City did not get involved in the issue of noise. By approving the Applicant's request, the City would find itself in litigation involving the impact of noise upon the adjacent residents. If the City wanted to avoid litigation involving noise in the Highway 52 reconstruction project, it should do likewise in this case and not grant the requests.
- B. These adjacent residents have acquired a prescriptive easement over the land to be excavated by the Applicant. As such, they have a legally-protected interest in the land and are entitled to compensation under an inverse condemnation theory.

24. In response to questions from Council members Nowicki and Hanson, the City

Attorney stated the following:

- A. The matter involving the presence or absence of noise walls along the soon-to-be reconstructed Highway 52 does not involve the City. There is no federal or state statute, nor any city ordinance, that authorizes the City to make any decision or recommendation on that issue. This case, on the other hand, involves requests for conditional use permits for land use activities within the City's boundaries. Further, this case seeks variances from the City's land use ordinances. Here, the City is directly involved and has every right, and indeed obligation, to get involved and to make a decision.
- B. This City Council cannot make a determination whether the adjacent residents can make the requisite showing of those elements needed to acquire a prescriptive easement over the property in question. That is a judicial determination to be made by a court.

25. The neighbors' and adjacent residents' testimony was general in nature. None of the speakers opposing the requests went through the applicable criteria to indicate whether the required finding could or could not be made. Instead, there was a general statement that the Applicant failed to satisfy the criteria.

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26. Furthermore, the neighbors' and adjacent residents' testimony focused on the interference with their use and enjoyment of their property during the excavation time period. However, this interference will be temporary in nature. There will be three years of excavation and one year of restoration. After that, this excavation activity will come to an end. The neighbors and adjacent residents have not shown that they will suffer any permanent injury or damage. Viewed over time, there has been no showing that the excavation/restoration activity will ultimately be incompatible with the existing development in this area.

27. By its testimony and proposed findings of fact, and its indicated willingness to abide by the ten proposed conditions of approval, the Applicant has shown that it has satisfied all of the criteria applicable to the requests for conditional use permits and variances. Consideration of the applicable guidelines also supports the issuance of the permits and variances. The Applicant has given every indication that it will go to great lengths to minimize as best as possible any interference with the adjacent residents' use and enjoyment of their property. Considering all of the applicable criteria and ordinance considerations, there is no legal basis for the City to deny the Applicant the requested conditional use permits or variances. As such, and pursuant to Minnesota case law, the City is compelled to issue the permits and variances.

#### CONCLUSIONS OF LA W

1. This matter is properly before the Common Council pursuant to R.C.O. §§60.533(4), 60.733(1), 61.301 and Minn. Stat. §462.3595, subd. 2.



2. By a substantial weight of the evidence presented, the Common Council determines that the Applicant's proposed findings of fact for the conditional use permits and the variances, as well as the Planning Department's proposed findings of fact for the variances, are persuasive and are adequately supported by the record. The Council adopts these findings of fact as its own.

3. By a substantial weight of the evidence presented, the Common Council determines that it cannot make any of the findings listed in R.C.O. §61.146. As such, the Applicant is entitled to issuance of the conditional use permits.

4. By a substantial weight of the evidence presented, the Common Council determines that upon consideration of the additional factors listed in R.C.O. §62.824, the issuance of the conditional use permits does not jeopardize the public's health, safety or welfare.

5. By a substantial weight of the evidence presented, the Common Council determines that it can make all of the findings listed in R.C.O. §62.1105 and, as such, the Applicant is entitled to issuance of the conditional use permits.

6. By a substantial weight of the evidence presented, the Common Council determines that it can make those findings listed in R.C.O. §60.417 and, as such, the Applicant is entitled to the issuance of the variances.

7. By a substantial weight of the evidence presented, the Common Council determines that the Applicant has satisfied the applicable criteria, standards and guidelines for the requested conditional use permits and variances, and its requests should be granted subject to the ten conditions described in Finding of Fact #12 and Finding of Fact #21.

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ORDER

The Common Council of the City of Rochester, pursuant to R.C.O. §§61.146, 62.824, 62.1105, 60.417(b) and 60.762 does hereby approve Conditional Use Permit #03-11 and Variance #03-07 by Zumbro River Constructors subject to the ten conditions described in Finding of Fact #12 and Finding of Fact #21. The decision of the Planning and Zoning Commission as to Variance #03-07 is hereby reversed in its entirety.

Dated at Rochester, Minnesota this \_\_\_\_\_ day of June, 2003.

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John Hunziker, President of the  
Rochester City Council

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